BRIEF IN SUPPORT OF PETITION

I.

OPINIONS IN COURT BELOW

These cases orignated in the United States Board of Tax Appeals. From decisions of the Board entered April 18, 1940 (R. 86) adverse to the petitioners they took the cases for review to the Circuit Court of Appeals for the Tenth Circuit. That Court dismissed the petitions for review. No opinion was written by the Board of Tax Appeals, and the opinion of the Court below handed down June 3, 1941, appears at pages 102-106 of the Record, and is reported in 120 Fed. (2d) 749.

II.

STATEMENT OF THE CASES

A statement of the cases containing all that is material to the consideration of the questions presented, with appropriate references to the printed record and decisions, has been made in the petition for the writs and such statement is hereby adopted and made a part of this brief.

III.

STATUTES INVOLVED

Section 1140(c)(2) of the Internal Revenue Code, 26 U. S. C. A., Sec. 1140:

"Section 1140. Date When Board Decision Becomes Final:

"(c) Decision modified or reversed:

"(2) Upon mandate of the Circuit Court of Appeals:

"If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, * * * then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

"Section 1142. Petition for Review:

"The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926), may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered. 53 Stat. 165."

IV.

ASSIGNMENT OF ERRORS

Petitioners make the following assignment of errors committed in the opinion and decision of the Court below:

1. The Circuit Court of Appeals erred in holding that the decision of the Board of Tax Appeals was under petitioners' theory a departure from its mandate.

2. The Circuit Court of Appeals erred in holding that the decision of the Board became final at the expiration of 30 days from the time it was rendered.

3. The Circuit Court of Appeals erred in dismissing petitioners' petitions to review.

4. The Circuit Court of Appeals erred in holding that the $173,000 deduction of attorneys' fees had been allowed and made by the Board.

5. The Circuit Court of Appeals erred in refusing to review the proceedings of the Board and allow the petitioners the deduction of $173,000 attorneys' fees.

V.

ARGUMENT

SYNOPSIS OF ARGUMENT

In support of the errors assigned the petitioners assert and rely on the following propositions which will be presented and considered in order:

1. The appeal to the Circuit Court of Appeals was not

a proceeding to correct the decision of the Board of Tax Appeals because of a departure from the mandate of the Circuit Court of Appeals, but was an appeal to determine the deduction of attorneys' fees as an ordinary business expense, a question not considered by the Circuit Court of Appeals, and did not in any way involve the construction of the mandate of the Appellate Court.

2. The Board of Tax Appeals, under the mandate of the Circuit Court of Appeals, had authority to make such decisions on questions not determined and settled by the Appellate Court as were necessary in order to determine the tax of petitioners.

3. The question of attorneys' fees had been left open and undecided by both the Board and the Circuit Court and was a proper and necessary question to be determined by the Board.

4. The petitioners were not given a deduction in the decision of the Board for the attorneys' fees expended and are entitled to such deduction.

5. The appeal to the Circuit Court of Appeals was governed by Section 1142 of the Internal Revenue Code, not by Section 1140 (c) (2) of such Code, and the Circuit Court of Appeals had jurisdiction.

Proposition One

The appeal to the Circuit Court of Appeals was not a proceeding to correct the decision of the Board of Tax Appeals because of a departure from the mandate of the Circuit Court of Appeals but was an appeal to determine the deduction of attorneys' fees as an ordinary business expense, a question not considered by the Circuit Court of Appeals, and did not in any way involve the construction of the mandate of the Appellate Court.

On the first appeal of these cases the Circuit Court of Appeals determined and settled but one question and that was the petitioners' gross income from the property (89 Fed. (2d) 412). The order of the Appellate Court was that the causes be "reversed and remanded to the Board for further proceedings in accordance with this opinion." The mandate (R. 17) ordered and adjudged "that this cause be and the same is hereby remanded to said United States Board of Tax Appeals for further proceedings in accordance with the opinion of this Court."

Upon the filing of the mandate from this Court the Board, on May 14, 1937, made its order "placing proceedings upon the day calendar of June 9, 1937, for hearing on final disposition in accordance with the views expressed in the opinion of the U. S. Circuit Court of Appeals (10) rendered March 29, 1937, and prior to hearing the parties file recomputations in accordance with such mandate" (R. 13). On June 25, 1937, petitioners filed their computation and a motion to receive further evidence (R. 13). The cases were placed on the day calendar of September 15, 1937, for hearing in accordance with order dated May 14, 1937 (R.

13). On September 28, 1937, the Board granted the taxpayers' motion to introduce further evidence. On November 24, 1937, a hearing was had before the Board and the cases submitted (R. 14). The Board rendered an opinion on February 23, 1938, and its decision was entered April 7, 1938. On June 27, 1938, the Commissioner filed petitions for review (R. 15).

The second opinion of the Circuit Court of Appeals was filed December 11, 1939, and the mandate to the Board of Tax Appeals (R. 18) ordered and adjudged that the Board "redetermine the tax in accordance with the opinion of this Court," and the Board was "commanded that such further proceedings be had in said cause, in conformity with the opinion and judgment of this Court as according to right and justice, and the laws of the United States, ought to be had."

On February 8, 1940, the Board ordered that the proceedings be placed upon the Washington calendar of February 28, 1940, "for final decisions in accordance with the views expressed in the opinion of said Court rendered December 11, 1939, and that prior to said hearing the parties file computations of the tax in accordance with said mandate and opinion, or otherwise move as may appear proper in the premises" (R. 20).

The Circuit Court of Appeals, in its second opinion (108 Fed. (2d) 712) decided but one issue, and that was whether development expenses should be considered the same as operating costs and be deducted in computing taxable income, in arriving at the net income from the property for

depletion purposes. The Court held that development expenses should be so deducted. Having decided the question of gross income from the property in its former opinion, it now determined the net income from the property and the depletion allowance. So, the cases went back to the Board with these questions settled: Gross income from the property, depletion allowance, and net income from the property. The computations set out in the opinion clearly reflect just what items were considered and just what questions were decided. We reproduce the computations:

"Operating Expense:

Production Expense		$ 272,042.56
General Overhead Expense		31,107.34
Depreciation on Equipment		110,888.17
Total Operating Expense		$ 414,038.07
Development Expense (drlg. costs)		$ 387,982.80
Equipment	$158,411.67	
Less: Depreciation sustained	110,888.17	$ 47,523.50
Total		$ 849,544.37.

"Gross Income from the property $1,213,456.09

Less: Operating and Development Expense	849,544.37
Net Income from the property	$ 363,911.72
50 per cent of the net income from the property equals	181,955.86
27½ per cent of the gross income from the property equals	333,700.42."

The crux of the present proceedings is that the deduction for attorneys' fees or other deductions or other income of the taxpayers, not *from the property*, are not included in these computations and were not before the Court for decision. Those were questions to be determined by the Board "in conformity with the opinion and judgment" of the Appellate Court—that is, not in violation of its opinion and mandate. The determination of the deduction for attorneys' fees was a question entirely outside the opinion of the Court and did not in any way involve a construction of the mandate. So long as the Board accepted the gross income from the property, the production expense, development costs, depreciation, depletion allowance and net income from the property fixed by the Court it was acting "in conformity with the opinion and judgment" of the Court. But so acting did not mean that the Board did not have authority to pass on other matters affecting tax liability, not before and decided by the Appellate Court.

On the first appeal the Circuit Court determined the gross income from the property. But that did not preclude the Board, upon a remanding of the cases, from determining the deductions to be made in determining depletion and arriving at the net income from the property. Over the objections of the Commissioner the Board did determine those questions (R. 68-75) and the Commissioner appealed from the decisions of the Board *more than 30 days after the decisions were entered*, thus impliedly conceding that the Board had a right to decide any question not settled by the Appellate Court.

When the cases came up for hearing on the recomputations filed, petitioners called the Board's attention to the fact that additional income in the sum of $177,343.70 had been added to petitioners' income, and also that petitioners were entitled to a deduction of $173,000 attorneys' fees as an ordinary business expense (R. 28-30). The Commissioner insisted that no additional income had been added and made no contention as to the attorneys' fees, but did exclude it as a deduction. After the argument of counsel the trial member of the Board announced that he would determine these questions from the transcript (R. 32).

The Board entered its decision on April 18, 1940, but made no finding of fact as to the attorneys' fees. They were, however, excluded, and petitioners were given no credit or deduction for that item (R. 86). In other words, the tax was computed by taking the basic figures of gross income from the property, development and operating costs, net income from the property and depletion, as fixed by the Circuit Court of Appeals, without any consideration being given to the $173,000.00 attorneys' fees. Here was a decision of the Board denying petitioners this deduction. Allowing or disallowing the deduction did not in any way involve the mandate of the Appellate Court, but was a decision on an issue expressly reserved by the Board when it made its decision from which the second appeal to the Circuit Court was taken. See Board's decision, Record 75. After noting that petitioners contended that the attorneys' fees should not be deducted in computing the net income from the property, the opinion reads:

"In the situation presented here, we do not decide

this point. However the item of attorneys' fees may have been formerly treated, it will not under this opinion be reflected in the recomputation of the net income from the property for the purpose of applying the 50 per cent limitations on the depletion allowance."

Here is a positive finding and decision that the attorneys' fees will be considered later and after the issue of depletion and net income from the property are determined. This question of attorneys' fees was no more involved in the second opinion of the Circuit Court of Appeals than was the question of depletion or net income in the first opinion of that Court. Under the first opinion the question only of gross income was involved, while the question of operating and development costs, depletion and net income were left open for further consideration by the Board. Under the second opinion the questions of operating and development costs, depletion and net income, which were determined by the Board, were involved, *but not the question of attorneys' fees which was expressly left open by the Board.* Since the Board did not pass on the issue of attorneys' fees and since the Circuit Court of Appeals did not have that question before it on review, it cannot be contended plausibly that the issue of attorneys' fees was involved in the decision of the Circuit Court of Appeals and within the scope of that Court's mandate, or that the issue was not a question yet to be determined by the Board.

Obviously, then, the Board had authority to determine whether the attorneys' fees should be deducted as contended for by petitioners. The deduction was not allowed, as will be clear from this computation:

Gross income from the property . . .	$1,213,456.09
Operating and development expense . .	849,544.37
Net income from the property, without depletion allowance	363,911.72
Depletion allowed under C. C. A. opin.	181,955.86
Net income from the property, after depletion allowance	181,955.86
Attorneys' fees expended	173,000.00
Net income from the property	8,955.86

Each taxpayer had approximately one-sixth of this net income, or $1,492.64. Ralph W. Crews had a personal exemption and credit for dependent of $3,900 (R. 27). The other five taxpayers had credits varying in amounts, but sufficient to show no tax liability.

The recomputation filed by the Commissioner (R. 25-27) and adopted by the Board shows a net income subject to tax of $26,011.79 for Ralph W. Crews and a tax liability of $1,949.41. This is substantially what the net income and tax amounts to with the attorneys' fees of $173,000 eliminated altogether.

It is clear, therefore, that the Commissioner and the Board accepted the basic figures of gross income, production costs, depletion and net income fixed by the Board, and computed the tax from them, without allowing any deduction for attorneys' fees. The Circuit Court of Appeals in its last decision (R. 105) said it was unable to determine from the record whether the $173,000 attorneys' fees had been eliminated from the computation, but that the Commissioner

"impliedly admits that the deduction was eliminated." Then the Court says:

> "Such elimination, if made, probably occurred in the recomputation made after the second decision of the Board."

As we have pointed out, the Board expressly declared in its opinion (R. 75) that the attorneys' fees were not reflected in the recomputation of the net income from the property, thus impliedly holding that it would be reflected as contended for by petitioners if the matter of attorneys' fees again became an issue in the proceedings. Anyhow, the question was left open for future consideration.

It follows, then, we respectfully submit, that the last appeal to the Circuit Court of Appeals was not a proceeding to correct the decision of the Board because of a departure from the mandate of the Appellate Court, but was an appeal to review the action of the Board on an unsettled issue, that of deduction for attorneys' fees as an ordinary business expense. The petitions for review were therefore filed in time.

Proposition Two

The Board of Tax Appeals, under the mandate of the Circuit Court of Appeals, had authority to make such decisions on questions not determined and settled by the Appellate Court as were necessary in order to determine the tax of petitioners.

Supplementing what has already been presented under Proposition One, the mandate of the Circuit Court of Appeals directed that the Board redetermine the tax in accordance with the opinion of the Court. *The only limitation*

on the Board in making its recomputation were the questions determined by the Appellate Court. The same issue was raised by the Commissioner when the cases were first remanded to the Board (R. 71). The Commissioner objected to any further proceedings raising a new issue, contending that the issue of development costs, separate and apart from operating costs, was "inseparably a part of and an essential factor of one of the issues heretofore presented to and decided by the Board and the Circuit Court of Appeals." Another objection by the Commissioner was that petitioners were "seeking for the first time other and further relief not accorded by the decision of the Circuit Court of Appeals," and, further, that the issue to be determined was not "clearly within the purview of the mandate of the Circuit Court of Appeals."

The Board answered the Commissioner's contention by saying that unless the case was remanded with directions to redetermine the tax *on a specific basis*, the Board had authority to give any other or further relief (R. 72), 37 B. T. A. 387, citing *Peavy-Byrnes Lbr. Co.*, 31 B. T. A. 985; affd., 86 Fed. (2d) 234; certiorari denied, 300 U. S. 674, wherein it was said:

> "The rule seems to be well settled by the weight of authority that an inferior tribunal, upon remand of a cause by an appellate court, can not take any action not reasonably within the express or implied directions of the reviewing court. * * * The mandate must be interpreted according to its subject matter; and the decree of the appellate court, as well as that of the court below, may be taken into consideration in the interpretation thereof."

The Board then observed that it was authorized to take such further proceedings as were "within the express and implied directions of the reviewing court," and that certainly the Board was not directed "to make merely a mathematical calculation according to a formula stated in the mandate." The Board further held that it was bound by the gross income determined by the Appellate Court, which was "the settled law of the case," but that it plainly had the right and the duty to determine other questions not settled by the Circuit Court of Appeals and necessary to a computation of the tax.

The situation was the same after the second appeal. There was no formula stated in the mandate, nor was there the direction of any particular judgment. The Board was bound only by the questions determined by the reviewing court, and it still had the right and the duty to determine other questions affecting tax liability, so long as their decision was not inconsistent with the decision of the Appellate Court. It was the Board's duty to take the case up at the point where its erroneous judgment was rendered and proceed from there to determine the tax liability. See *Exchange Mutual Life Ins. Co.* v. *Warsaw-Wilkinson Co.*, 185 Fed. 487, 107 C. C. A. 587.

It is significant that there is no contention that these cases were not appealable. Nor has it been contended that the question of deduction of attorneys' fees should not have been determined. The only issue is whether the question of this deduction was settled by the decision of the Circuit Court of Appeals, thus making the appellate proceedings

an attempt to correct the decision of the Board to conform to the mandate of the Court. Such being true, the Board admittedly had authority to make a decision on the issue of attorneys' fees. This issue not having been involved in any of the appellate proceedings, the petitioners had the right of appeal granted them by Section 1142 of the Revenue Code.

Proposition Three

The question of attorneys' fees had been left open and undecided by both the Board and the Circuit Court of Appeals and was a proper and necessary question to be determined by the Board.

This proposition has been covered by the argument under the two preceding propositions. The Commissioner has never contended that the petitioners were not entitled to the deduction for attorneys' fees, and the Circuit Court of Appeals in its last decision says the Commissioner impliedly concedes that this deduction was not considered by the Board. The question was therefore left open for determination.

Proposition Four

The petitioners were not given a deduction in the decision of the Board for the attorneys' fees and are entitled to such deduction.

We have made it clear from the computation set out in the argument under Proposition One that the petitioners were not given this deduction. It is "impliedly admitted"

by the Commissioner, and the Circuit Court of Appeals so states in its last opinion.

The law is settled that petitioners are entitled to deduct their attorneys' fees as an ordinary business expense from the net income from the property after depletion.

Bliss v. *Commissioner of Internal Revenue*, 57 Fed. (2d) 984.

Commissioner of Internal Revenue v. *Continental Screen Co.*, 58 Fed. (2d) 625.

Commissioner of Internal Revenue v. *Speyer*, 77 Fed. (2d) 824.

Commissioner of Internal Revenue v. *Chicago Dock & Canal Co.*, 84 Fed. (2d) 878.

National Outdoor Adv. Bureau v. *Helvering*, 89 Fed. (2d) 35.

Kales v. *Commissioner of Internal Revenue*, 101 Fed. (2d) 604.

Helvering v. *Speyer*, 296 U. S. 631.

Helvering v. *F. & R. Lazarus & Co.*, 308 U. S. 252.

Deputy v. *DuPont*, 308 U. S. 488.

These cases all construe the Revenue Act of 1928, Sec. 23(a), 26 U. S. C. A., Sec. 23(a), or the Act as amended. The taxes in dispute are for 1930 and come under the 1928 Act.

Proposition Five

The appeal to the Circuit Court of Appeals was governed by Section 1142 of the Internal Revenue Code, not by Section 1140(c)(2) of such Code, and the Circuit Court of Appeals had jurisdiction.

From the argument under the preceding propositions we think it clear that the question of deduction for attorneys' fees from the net income from the property after depletion, as contended for by petitioners, was not before the Circuit Court of Appeals and was not, therefore, settled or affected by that Court's decision and mandate.

The Circuit Court of Appeals sustained the Commissioner's motion to dismiss the petitions to review for lack of jurisdiction, under authority of Section 1140(a)(2) of the Internal Revenue Code, 26 U. S. C. A., Sec. 1142.

The construction of this section apparently has not been before this Court. The Commissioner in his argument before the Appellate Court relied on the cases of *Virginia-Lincoln Furn. Corp.* v. *Commissioner*, 67 Fed. (2d) 8, and *Peavy-Byrnes Lumber Co.* v. *Commissioner*, 86 Fed. (2d) 234. We submit that these cases do not apply to the situation in the instant cases. It is clearly announced in the Virginia-Lincoln Furn. Corp. case that the decision was based on the fact that "nothing remained for the Court to do but make the necessary calculations and enter the order." The rule announced in the Peavy-Byrnes Lumber Co. case as to new issues does not apply, for the reason that the issue of attorneys' fees was properly before the Board without objections from either side.

The statute (Sec. 1140(c)(2), Rev. Code) is not clear, as the Court pointed out in the Virginia-Lincoln Furn. Corp. case, but the purpose of the statute must be to curtail the time for taking appeal only in cases where the Board does not follow the direction of the Appellate Court on the issues before that Court and determined by its decisions. The Board took further action on a matter not before the Circuit Court of Appeals, but a matter necessary to be decided by the Board before the tax liability could be determined. It is of this action of the Board petitioners are complaining. The question of attorneys' fees not being in issue before the Circuit Court of Appeals it could not be within the scope of that Court's mandate, nor would the mandate preclude a hearing on that issue.

It is significant that both mandates from this Court remanded the case for further proceedings in accordance with the opinion, and that after each mandate was filed the Board made identical orders as to further proceedings (R. 13 and 15). After the filing of the first mandate the issue as to whether development expenses should be deducted before or after determination of depletion allowance was raised. From the decision of the Board on this question, the Commissioner appealed to this Court on petitions for review filed under Section 1142 of the Revenue Code and more than thirty days after the decision of the Board.

It was strenuously contended by the Commissioner before the Board that the issue of development expenses could not be raised by the taxpayers, and that the Board had authority only to determine the tax by taking the gross

income as fixed by this Court and making deductions only as they had been previously made before the Board. 37 B. T. A. 387.

The Board held against the Commissioner and the Commissioner appealed. And the appeal was taken more than 30 days after the decision of the Board was rendered. The Circuit Court of Appeals entertained the appeal, so we have both the Commissioner and the Appellate Court holding that the new issue raised after the first appeal was not precluded by the mandate.

As the Board held, it was not directed by this Court "to make merely a mathematical calculation according to a formula stated in the mandate."

In the instant case this Court determined the treatment of development costs and the net income from the property. It set out no formula for determining the tax. It did not attempt to preclude inquiry into the different deductions or exemptions or items. It did not pass upon the proper way to deduct the attorneys' fees. The cases were remanded to the Board for further proceedings in accordance with the opinion.

Since the issue of attorneys' fees was not settled by the decision of the Circuit Court of Appeals, and a decision of that issue did not involve a departure from the mandate of that Court, but was an issue essential to a determination of the tax liability, the aggrieved party had the right to appeal from the decision of the Board on that issue, and to

prosecute the appeal under Section 1142 of the Internal Revenue Code.

We respectfully submit that the Circuit Court of Appeals had jurisdiction to entertain the appeal of petitioners.

CONCLUSION

Writs of certiorari should be granted as prayed in the petition.

Respectfully submitted,

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Dated August 21, 1941.